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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1209.

CHARLES E. and ROBERT E. BUCKLEY
dba BUCKLEY'S AUTO WRECKING,
Appellants,

vs.

STATE OF OHIO, by JAMES V. BARBUTO,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS OR AFFIRM.

JAMES V. BARBUTO,
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ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS OR AFFIRM.

James V. Barbuto, Prosecuting Attorney of Summit County, Ohio, Appellee in this case, respectfully moves this Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss this appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal ground, or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE.

On January 30, 1965, James V. Barbuto, Prosecuting Attorney of Summit County filed an application under Section 4734.11, Ohio Revised Code, in the Court of Common Pleas of Summit County to enjoin the named defendants, Charles E. and Robert E. Buckley, doing business as Buckley's Auto Wrecking, from further operation of their

junk yard located at 2977 Manchester Road, Akron, Ohio, and to have said junk yard abated as a nuisance.

The application alleged facts to bring the operation of the junk yard within the junk yard licensing statute, Sections 4737.05 to 4737.11, inclusive, and Section 4737.99 of the Ohio Revised Code. It was also alleged that the junk yard was being operated in violation of Section 4737.07, Revised Code, in that it was being operated without a fence of the specified height and construction and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the road. It was further alleged that a fence constructed to enclose the junk yard was constructed using vertical fence posts of varying lengths extending above the top of the horizontal fencing, creating unsightly and disorderly construction in violation of Section 4737.09, Revised Code.

Defendants, by answer and cross petition, impleaded new parties defendant to include the Auditor of Summit County, the Sheriff of Summit County, the Prosecuting Attorney of Summit County and the Attorney General of Ohio. The answer contained a general denial and set up defenses to the effect that their business was exempt and excluded from the application of the junk yard statutes and denied operation of the business in violation of the statutes and also denied that said business was a nuisance.

Defendants further alleged that the junk yard statutes violated the Constitution of the State of Ohio and the Constitution of the United States in that said statutes were based solely on aesthetic considerations and, therefore, an unconstitutional exercise of the police power. They further alleged that the junk yard statutes were not capable of uniform application throughout the State of Ohio and were arbitrary and unreasonable and that said statutes failed to contain any standards of guidance and

constituted an unlawful delegation of legislative power to the Prosecuting Attorney and to the Attorney General to apply for an injunction and abatement of the defendants' business as a nuisance. It was also alleged that the junk yard statute deprived defendants of the use of their property and that the statute was indefinite and not capable of interpretation and compliance. It was further alleged that the requirement for the licensing of junk yards was improper, invalid and contrary to law.

By cross petition defendants asked for a declaratory judgment praying the court for an order finding them exempt and excluded from the operation of the junk yard statutes, and in the alternative asking the court to determine the construction and validity of the statutes and to declare the rights, status and other legal relations of the parties thereunder and to declare the statutes unconstitutional and ineffective and without force of law.

The case was heard before the Court of Common Pleas and upon consideration of the pleading, evidence and briefs of counsel, the court was of the opinion that the defendants Buckley came within the purview of the junk yard statutes. The court held that defendants had substantially complied with the statute, but that in the exercise of the court's common law equitable jurisdiction a nuisance did exist and the defendants were ordered to perform certain corrective measures. The court further held that the junk yard statutes were not unconstitutional on the grounds of being purely aesthetic in character or in their requiring the licensing of junk yards. The court held that that part of Section 4737.05, Revised Code, *et seq.*, dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite and unenforceable and cannot be uniformly applied to all junk

yards and where scrap processing dealers are specifically exempted from the statutes, the statutes are thereby discriminatory, and therefore, unconstitutional, null and void. The court enjoined the defendants Auditor, Sheriff, Prosecuting Attorney, and Attorney General from exercising the powers and duties conferred upon them by the junk yard statutes as against defendants Buckley.

The Attorney General and the Prosecuting Attorney of Summit County appealed on questions of law and the defendants Buckley cross-appealed on questions of law.

The Court of Appeals reversed the judgment of the trial court which found that that part of Section 4737.05, Ohio Revised Code, as it pertains to "(a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement" was unconstitutional, null and void. In all other respects the court affirmed the judgment of the trial court and dissolved the injunction.

Upon appeal to the Supreme Court of Ohio the judgment of the Court of Appeals was affirmed in a decision dated December 31, 1968.

ARGUMENT.

The appellant, in his original answer and cross-petition, alleged that the Ohio junk yard statutes violated the Constitution of the State of Ohio and the Constitution of the United States. This was done without assigning a specific federal question. His brief filed in the trial court assigned specific reason for his claim of unconstitutionality of the statutes. However, at the trial of the cause, as demonstrated by the bill of exceptions, no evidence was adduced that would support appellants' argument on the question of the constitutional validity of the Ohio junk yard statutes.

The issue of whether or not a statute based solely on aesthetic considerations is an unconstitutional exercise of the police power has been presented to this Honorable Court in *Desert Outdoor Advertising, Inc. v. San Bernardino City,* Docket No. 114, wherein at the October Term 1968 a motion to dismiss the appeal was granted and the appeal was dismissed for want of a substantial federal question.

This Court in *Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27, stated:

> "The concept of the public welfare, for the purpose of which the legislature may exercise its police power, is broad and inclusive, and the values it represents are spiritual and esthetic, as well as physical and monetary."
>
> "A determination that the public welfare requires the community to be beautiful, spacious, and well balanced, as well as healthy, clean, and carefully patrolled, is within the power of the legislature."

We respectfully submit that the question of esthetic considerations for legislation having been determined by this Court to be a proper exercise of the police power of the various states no federal question is present here.

We respectfully direct the Court's attention to the bill of exceptions and the questions: (1) Does a requirement that a junk yard be obscured from the ordinary view of persons passing on the roads take property without due process of law where the yard cannot be obscured due to topographical conditions? and (2) Are the statutes unconstitutional in their application to appellant Buckleys' property?

The record is completely void of evidence that appellants' property cannot be obscured due to topographical conditions or in any manner taken. The trial court found

to the contrary: It found that with certain practical modifications to the existing fence and a reasonable disposition of the junk cars therein the appellant would comply with the requirements of the statute.

The law in Ohio is that the General Assembly may provide that a particular use of land shall be unlawful even though that use had heretofore been lawful. *Ghaster, Inc. v. Preston,* 176 Ohio St. 425, *McKee v. City of Akron,* 176 Ohio St. 282, held that depriving an owner of the unrestricted use of his land does not necessarily amount to a taking of his property.

We, therefore, respectfully submit that the statutes in question simply restricts the manner in which the junk yard operator may use his land. It does not disturb the owner in the control or use of his property or restrict his right to dispose of it. In the absence of any evidence of a taking no substantial federal question is raised.

Ohio courts follow the rules set out in *Eastman v. The State of Ohio,* 131 Ohio St. 1, in construing statutes. Those rules are:

> "A statute cannot be held invalid for uncertainty if any reasonable and practical construction can be given to its language; mere difficulty in ascertaining its meaning, or the single fact that it is susceptible of different interpretations will not necessarily render it nugatory; it is the duty of its courts to endeavor by every rule of construction to ascertain its meaning and give full force and effect to, every enactment of the General Assembly not obnoxious to Constitutional prohibition."
>
> "Words in common use will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them."

Following these rules the courts below found appellants' contention that the statutes were vague and indefi-

nite in the definition of fences, in creating a legislative nuisance by the lack of same, and in their provision for enforcement to be without merit.

This Honorable Court in *Berman v. Ross,* 167 U. S. 548, 17 S. Ct. 966, said with respect to acts of Congress, it is only when no other reasonable construction can be supported, that such an act can be declared to be unconstitutional and void or invalid for any cause. It is respectfully submitted that the appellant has failed to show by evidence or argument that no other reasonable construction can be supported to the exclusion of that of the Courts below.

The courts below found no unlawful delegation of legislative power but that this so-called unlawful delegation of legislative power was merely an enforcement procedure for failure to comply. The statute is clear: It left the determination of whether or not a nuisance exists to the court.

Upon the authority of *Cramp v. Board of Public Instruction of Orange County, Fla.,* 82 S. Ct. 275, 368 U. S. 278, 7 L. Ed. 2d 285, we respectfully submit that this Court accept the Ohio courts' construction of these statutes.

With respect to appellants' argument that the statutes deny equal protection of the laws by being discriminatory in exempting scrap yards therefrom as distinguished from auto wrecking yards, it is generally recognized that when a legislative body decides to correct a particular evil, it need not correct all at once. *Yee Bow v. City of Cleveland,* 99 Ohio St. 269; *City of Xenia v. Schmidt,* 101 Ohio St. 437. Furthermore, in *Central Lunber Co. v. South Dakota,* 226 U.S. 157, 160, it is stated by Justice Holmes:

> "* * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be

dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

Justice Brandeis said in *Zucht v. King*, 43 S. Ct. 24, 260 U. S. 174, 67 L. Ed. 194:

> "A long line of decisions by this Court has also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing."

CONCLUSION.

It is respectfully urged that this Motion to Dismiss be sustained for the reason that the case does not present a substantial federal question but rather that the judgment rests on an adequate non-federal basis through the state courts' interpretation and construction of its own police powers; or in the alternative that the judgment of the Supreme Court of Ohio be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial in the light of well-settled law as not to need further argument.

Respectfully submitted,

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APPENDIX.

DECISION OF THE COURT OF COMMON PLEAS.

Court finds, first of all, that the defendant has made an effort to comply with the Statute and should be commended for this action. However, he falls short of full compliance within the meaning and purpose of the Statute, as follows:

1. The fence along Manchester Road on each side of the building should be increased in height by a two foot (2′) steel panel similar to the existing fence.

2. The Cove Road fence is satisfactory.

3. The Cormanny Road existing fence should be raised to close to ground level and then an additional two foot (2′) panel placed on top, increasing the height by two feet (2′).

4. The fence in the rear should be increased by a two foot (2′) panel.

5. All poles should then be cut level with the top of the fence.

6. Cars cannot be piled more than two (2) high.

7. No junked autos are to be left in the front on Manchester Road.

If the defendant desires to comply with the above order within thirty (30) days, it will be unnecessary to hear the Constitutional question raised in the cross petition and an entry may be submitted accordingly. Otherwise, counsel should notify the Court if additional proceedings are necessary.

/s/ T. W. MITCHELL
T. W. Mitchell, *Judge*
(By Assignment).

STATUTES.

Section 4737.05, Ohio Revised Code:

"As used in sections 4737.05 to 4737.11, inclusive, of the Revised Code:

"(A) 'Junk' means old or scrap copper, brass, rope, rags, batteries, paper, rubber, junked, dismantled, or wrecked automobiles or parts thereof, iron, steel, and other old or scrap ferrous or non-ferrous materials which are not held for sale for remelting purposes by an establishment having facilities for processing such materials.

"(B) 'Junk yard' means an establishment or place of business, other than an establishment having facilities for processing iron, steel, or non-ferrous scrap and whose principal product is scrap iron and steel or non-ferrous scrap for sale for remelting purposes, which is maintained or operated for the purpose of storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard, except an establishment or place where automobiles, wrecked or otherwise, are held or impounded for a period not to exceed ninety days exclusively for storage, repair, or resale without alteration.

"(C) 'Fence' means an enclosure at least six feet in height, constructed of non-transparent material, and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the state, county, and township roads in this state."

Section 4737.06, Ohio Revised Code:

"No person shall operate or maintain a junk yard outside a municipality unless he has first obtained a license issued under sections 4737.05 to 4737.11, inclusive of the Revised Code.

"No licensee shall operate or maintain a junk yard in violation of the provisions of sections 4737.05 to 4737.11, inclusive, of the Revised Code."

Section 4737.07, Ohio Revised Code:

"No person shall operate and maintain a junk yard outside of a municipality without first obtaining a license to do so from the county auditor of the county in which such junk yard is located or in which such junk yard is to be established. A person who was operating or maintaining a junk yard prior to January 1, 1964 is entitled to be issued a license or renewal thereof upon payment of the fee provided for in this section. Any person operating or maintaining a junk yard within one thousand feet of a state or county road or within three hundred feet of a township road, prior to January 1, 1964, shall have one year thereafter to erect the required fence if such junk yard is not obscured by natural objects. If, after January 1, 1964, a junk yard is established within one thousand feet of a state or county highway or within three hundred feet of a township road, it must be so located that the view thereof from such road is obscured by natural objects or a fence. If the yard is so obscured, the person operating or maintaining it shall be entitled to a license.

"The fee for a license under this section is twenty-five dollars. All licenses issued under this section shall expire on the first day of January following the date of issue. A license may be renewed from year to year upon paying the auditor of the county in which the junk yard is located the sum of ten dollars for each such renewal.

"All fees paid under this section are for the use of the county which issues the license or renewal thereof.

"Any license or renewal thereof issued under this section may be revoked by the county auditor of the county in which the licensee's junk yard is located, after reasonable notice and opportunity to be heard, for any violation of sections 4737.01 to 4737.11, inclusive of the Revised Code, by the licensee or by any of his officers, agents, or employees. Whenever a license has been revoked under this section, the county auditor shall not issue another license to such licensee, to the husband or wife of such licensee, or to any partnership or corporation of which he is an officer or member, until the expiration of at least one year from the date of revocation of such license."

Section 4737.08, Ohio Revised Code:

"Application for a license to operate and maintain a junk yard or for a renewal thereof shall be made in writing, accompanied by the proper fee, to the county auditor of the county in which the junk yard is located or in which it is to be established, setting forth the name and address of the applicant, the location of the junk yard, if the applicant is a firm, partnership, or association, the names and addresses of each member, if the applicant is a corporation, the date and place of incorporation and the names and addresses of its officers and directors, and such other reasonable information as the county auditor deems necessary. The application shall be signed and sworn to by the applicant."

Section 4737.09, Ohio Revised Code:

"Any fence constructed under sections 4737.05 to 4737.11, inclusive, of the Revised Code, shall be neatly constructed, shall be non-transparent, shall be kept in good order and repair, and no advertisement shall be permitted thereon other than the name of the person under

whose name the license has been issued and the nature of the business conducted therein."

Section 4737.10, Ohio Revised Code:

"Twice annually the Sheriff of each county shall inspect every junk yard that is located within his jurisdiction and for which a license has been issued under sections 4737.05 to 4737.11, inclusive, of the Revised Code, to obtain information with regard to whether the licensee's business has been and is being conducted in accordance with sections 4737.01 to 4737.11, inclusive, of the Revised Code. The Sheriff shall submit a written report of each such examination to the County Auditor wherein such junk yard is located.

"The Sheriff shall, for the purpose of this examination, have free access to the grounds and buildings used in the conduct of the junk yard business by the licensee.

"Such inspections may be made at any time, at the option of the sheriff, during the regular work hours of the licensee or within the hours of eight a.m. and five p.m. Monday through Friday."

Section 4737.11, Ohio Revised Code:

"Whenever the prosecuting attorney of any county or the attorney general is of the opinion that a junk yard is being operated or maintained in violation of any of the provisions of sections 4737.05 to 4737.11, inclusive, of the Revised Code, he may apply, in the name of the state, to a court of competent jurisdiction, alleging the violation complained of and praying for an injunction or other proper relief. In such a case, the court may order such junk yard abated as a nuisance or make such other order as may be proper. An action brought under this section shall not be deemed to be a bar to a prosecution under section 4737.99 of the Revised Code."

Section 4737.99, Ohio Revised Code:

"(A) Whoever violates sections 4737.01 to 4737.11, inclusive, of the Revised Code, shall be fined not less than twenty-five nor more than one thousand dollars and the costs of prosecution."